

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE NATIONAL PRESCRIPTION
OPIATE LITIGATION

This document relates to:

All Cases

MDL No. 2804

Case No. 17-md-2804

Judge Dan Aaron Polster

**SUPPLEMENTAL JOINT MOTION TO ALLOW CERTAIN INSYS-RELATED
WITNESSES TO BE DEPOSED BEYOND JANUARY 25, 2019**

On December 14, 2018, the Court granted the Joint Motion To Allow Certain Insys-Related Witnesses To Be Deposed Beyond January 25, 2019 (Dkt. #1184). Pursuant to the Court's order, the depositions of several witnesses related to Defendant Insys Therapeutics, Inc. ("Insys") will take place after the conclusion of the criminal action brought by the Department of Justice ("DOJ") in the United States District Court, District of Massachusetts (Case:1:16-cr-10343-ADB) against certain former employees of Insys. On December 18, 2018, counsel for Dr. John Kapoor, a defendant in the above criminal action, advised that Dr. Kapoor will move to stay his deposition in the Track One cases until after the conclusion of the criminal trial scheduled to start January 28, 2018. The parties believe that other criminal defendants in the above action that Plaintiffs have identified for deposition (i.e., Sunrise Lee, Michael Babich, Michael Gurry, Joseph Rowan and Alec Burlakoff) will also move to stay their depositions for the same or similar reasons. As such, pursuant to the Court's scheduling order CMO-1 (Dkt. 232), CMO-7 Setting New Deadlines for Track One Cases (Dkt. 876), and Federal Rule of Civil Procedure 16, Plaintiffs and Insys jointly move to allow the depositions of the above criminal defendants to be taken following the adjudication of the DOJ's criminal action.

1. The Court entered a modified scheduling order setting new deadlines for track one cases on August 13, 2018. See CMO-7 Setting New Deadlines For Track One Cases (ECF No. 876).

2. The current deadline for all 30(b)(6) and fact depositions is January 25, 2019. CMO-7 at pg. 2.

3. On June 29, 2018, Plaintiffs served an amended notice of deposition pursuant to rule 30(b)(6) and document request pursuant to rule 30(b)(2) and Rule 34 to Insys. On July 27, 2018, Plaintiffs served notice of deposition upon a number of Insys-related witnesses.

4. On October 31, 2018, Plaintiffs served a letter identifying additional Insys-related witnesses.

6. On November 27, 2018, and on several occasions in December 2018, counsel for Insys and Plaintiffs conferred concerning the relief requested in this motion, and agreed that they would jointly petition this Court to extend the deadlines for the depositions of John Kapoor, Sunrise Lee, Michael Babich, Michael Gurry, Joseph Rowan and Alec Burlakoff because they are defendants in the above mentioned criminal matter. Postponing these depositions may also affect expert reports, because the parties' experts may not have the benefit of information obtained in the postponed depositions before the deadlines for expert reports, which for Plaintiffs is February 8, 2019 and for Insys is March 26, 2019. The parties believe that the best way to address this issue is to permit supplementation of expert reports to the extent these witnesses' depositions require such supplementation, and jointly agreed to seek such relief from the Court as well.

7. On December 14, 2018, the Court granted the Joint Motion To Allow Certain Insys-Related Witnesses To Be Deposed Beyond January 25, 2019 (Dkt. #1184).

8. Other depositions for witnesses not being objected to by the DOJ, or not currently criminal defendants, are currently on calendar or being scheduled in accordance with CMO-7. The 30(b)(6) deposition of Insys' designee was conducted on November 28, 2018. The parties are not seeking to extend any deadlines other than the limited relief sought in this motion and directly related to the depositions of witnesses who are criminal defendants.

9. Good cause exists to extend the deadline to conduct the depositions of witnesses identified in Paragraph 6, and to permit later supplementation of expert reports for the limited purpose of addressing testimony from such deponents if necessary. The Federal Rules of Civil Procedure allow for a scheduling order to be modified "for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). Good cause exists where "a deadline cannot reasonably be met despite the diligence of the party seeking the extension." *Marcilis v. Twp. of Redford*, 693 F.3d 589, 597 (6th Cir. 2012) (internal citations and quotations omitted). "An 'important consideration for a district court deciding whether Rule 16's good cause standard is met is whether the opposing party will suffer prejudice by virtue of the amendment.'" *Id.* (quoting *Leary v. Daeschner*, 349 F.3d 888, 906 (6th Cir. 2003)). Under this standard, there is clearly good cause to extend the scheduling order in this case and allow Insys-related depositions to be completed after the January 25, 2019 deadline.

10. As described above, through no fault of either counsel for Plaintiffs or Insys, the current deadline for depositions - January 25, 2019 - cannot reasonably be met for the above witnesses while the United States criminal matter is ongoing. Further, the DOJ has advised that the criminal action should be completed by May 15, 2019 at which time the parties will promptly conduct the depositions and supplement expert reports, if necessary, expeditiously.

11. For the foregoing reasons, the parties jointly ask this Court to allow them to conduct the depositions of the witnesses that are criminal defendants beyond the current January 25, 2019 deadline, and to allow supplementation of the expert reports to address testimony from those depositions to the degree necessary.

Respectfully submitted,

s/Peter H. Weinberger

Peter H. Weinberger (0022076)

SPANGENBERG SHIBLEY & LIBER

1001 Lakeside Avenue East, Suite 1700

Cleveland, OH 44114

(216) 696-3232

(216) 696-3924 (FAX)

pweinberger@spanglaw.com

Plaintiffs' Co-Liaison Counsel

s/Hunter J. Shkolnik

Hunter J. Shkolnik

Salvatore C. Badala

Joseph L. Ciaccio

360 Lexington Avenue

New York, New York 10017

hunter@napolilaw.com

sbadala@napolilaw.com

jciaccio@napolilaw.com

(212) 397-1000

Plaintiffs' Counsel

s/J. Matthew Donohue

J. Matthew Donohue

Joseph L. Franco

HOLLAND & KNIGHT LLP

2300 U.S. Bancorp Tower

111 S.W. Fifth Avenue

Portland, OR 97204

Tel: (503) 243-2300

matt.donohue@hklaw.com

joe.franco@hklaw.com

s/Nicholas A. Sarokhanian
HOLLAND & KNIGHT LLP
200 Crescent Court, Suite 1600
Dallas, TX 75201
Tel: 214.964.9500
nicholas.sarokhanian@hklaw.com

Attorneys for INSYS Therapeutics, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2019, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system. Copies will be served upon counsel of record by, and may be obtained through, the Court CM/ECF system.

s/Peter H. Weinberger
Peter H. Weinberger
Plaintiffs' Co-Liaison Counsel